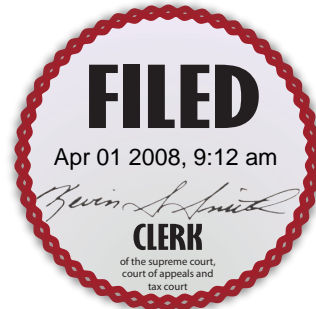


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE  
COURT OF APPEALS OF INDIANA**

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DEREK L. CARTER,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 18A02-0706-CR-532
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

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APPEAL FROM THE DELAWARE CIRCUIT COURT  
The Honorable Wayne J. Lennington, Judge  
Cause No. 18C05-0703-FB-10

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**April 1, 2008**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**BARNES, Judge**

## **Case Summary**

Derek Carter appeals his conviction for Class B felony armed robbery and an habitual offender enhancement. The State cross appeals, contending that the trial court erred in issuing the habitual offender portion of the sentence. We affirm in part and remand for re-sentencing.

## **Issues**

Carter presents two issues for our review and the State presents one issue on cross appeal, which we restate as:

- I. whether the trial court abused its discretion by denying Carter's request for a mistrial;
- II. whether a comment by the trial judge amounted to impartiality and fundamental error; and
- III. whether the trial court erroneously ordered the thirty-year enhancement for the habitual offender finding to be served as a separate, but concurrent, sentence to the twenty-year sentence for armed robbery.

## **Facts**

On February 27, 2007, Falon Stewart went to a house in Muncie to meet a former coworker and collect forty dollars that she had loaned the coworker. Carter answered the door of the home. He had gold teeth and was wearing a white fur coat. He told Stewart that her former coworker was not at the home, but told her to come inside. Once inside, Carter held a gun to Stewart's head and said, "open your f\*\*\*\*\* purse, b\*\*\*\*\*!" Tr. p. 160. He grabbed her purse and removed a bottle of medicine, prescribed for Stewart's mother. Stewart ran from the home, returned to her car, drove away, and called 911.

While speaking with the police officer dispatched to the scene, Stewart noticed Carter walking down the sidewalk. Officers arrested Carter and searched the residence. Officers recovered a handgun and a prescription bottle with Stewart's mother's name on it.

The State charged Carter with Class B felony armed robbery and with being an habitual offender. A jury found Carter guilty of Class B felony armed robbery and found that he was an habitual offender. The trial court sentenced Carter to twenty years for the armed robbery conviction and thirty years for being an habitual offender, to run concurrently. This appeal followed.

## **Analysis**

### ***I. Motion for Mistrial***

During the trial, one of the State's witnesses stated that Carter was "currently incarcerated." Tr. p. 281. Carter objected, asked for an admonishment to the jury, and moved for a mistrial. The trial court admonished the jury that an arrest and placement in jail is not evidence of guilt or innocence. It denied Carter's request for a mistrial. Carter contends that the mention of his incarceration served as an evidentiary harpoon and violated his right to due process and a fair trial and that he was entitled to a mistrial.

To prevail on an evidentiary harpoon claim, the defendant must show that the prosecution acted deliberately to prejudice the jury and the evidence was inadmissible. Alvies v. State, 795 N.E.2d 493, 504 (Ind. Ct. App. 2003), trans. denied. Following the inadmissible remark by the witness regarding Carter's incarceration, the prosecutor stressed to the trial court that the remark was inadvertent. The prosecutor admitted that

she completely forgot to caution her witness not to say that Carter was incarcerated. She explained that she called that witness for the purpose of identifying the photos taken of Carter when he was arrested. Under these circumstances, Carter cannot prove that the prosecution acted deliberately to prejudice the jury. We conclude that the comment regarding Carter's incarceration was not an evidentiary harpoon.

The decision whether to grant a mistrial will be reversed only for an abuse of discretion. Harris v. State, 824 N.E.2d 432, 439 (Ind. Ct. App. 2005). "A mistrial is an extreme remedy warranted only when no other curative measure will rectify the situation." Id. To prevail on appeal from the denial of a motion for mistrial, the defendant must establish that the questioned information or event was so prejudicial and inflammatory that he or she was placed in a position of grave peril to which he or she should not have been subjected. Id. The gravity of the peril is determined by considering the probable persuasive effect of the event on the jury's decision. Id.

We cannot conclude that the mention of Carter's incarceration was so prejudicial that it put him in a position of grave peril. As Officers Walker and Curtis had already testified that Carter was arrested, it would not be a stretch of the imagination for the jury to logically assume that he was taken to jail. The trial court admonished the jury not to consider a defendant being in jail at one time, or for some time, as evidence of guilt or innocence. The admonishment was sufficient and it was not an abuse of the trial court's discretion to deny Carter's motion for mistrial.

## ***II. Impartiality***

Carter claims he was denied a fair trial because the trial judge referred to the prosecutor as “dear.” Tr. p. 236. The term was used to address the prosecutor during the following exchange regarding the characterization of a recent objection.

Ms. Calhoun: I don’t understand his objection your honor.

The Court: Well, I—that’s what he said. It was his second objection was to the Constitution of the United States, illegal search and seizure. Now, if that’s what he says he wants to do, then we will hear that, and we will have a hearing to determine whether or not it was a proper search . . .

Ms. Calhoun: If that’s your choice your honor.

Mr. Hunter: If that’s what the court deems the appropriate . . .

The Court: It’s not my choice, it’s his objection, dear.

Ms. Calhoun: I guess I don’t understand that to be his objection. That’s what I’m getting at.

Tr. pp. 236-37.

Carter admits that he did not object to the trial court’s remark, but insists that the issue is not waived because the comment constituted fundamental error. See Cooper v. State, 854 N.E.2d 831, 835 (Ind. 2006) (explaining that fundamental error is an extremely narrow exception that allows a defendant to avoid waiver). Carter contends that the trial court’s use of a term of endearment to address the prosecutor demonstrates bias and prevented him from having a fair trial.

“The impartiality of a trial judge is especially important due to the great respect that a jury accords the trial judge and the added significance that a jury might give to any showing of partiality by the trial judge.” Ruggieri v. State, 804 N.E.2d 859, 863 (Ind. Ct. App. 2004). Our reading of the transcript leads us to conclude that the remark was innocuous and did not constitute a term of endearment or partiality. In context, the trial court was disagreeing with the prosecutor and the addition of “dear” could also easily be interpreted as paternalistic or condescending and damaging to the State, not Carter. The remark clearly does not rise to the level of fundamental error. See Cooper, 854 N.E.2d at 835 (Fundamental error “is an error that makes a fair trial impossible or constitutes clearly blatant violations of basic and elementary principles of due process.”) (internal quotations omitted).

### ***III. Sentence***

The State argues on cross appeal that the trial court erred in assigning the sentence for the habitual offender enhancement. The trial court assigned twenty years for Carter’s armed robbery conviction and thirty years for his habitual offender enhancement, to run concurrently.

The Court:	It will be the judgment of this Court that on Count One, Robbery, that the defendant be sentenced to the Indiana Department of Correction for a period of twenty years. As to Count two, the Habitual Offender, the statutory provision, “the Court shall sentence a person found to be a Habitual Offender to an additional fixed term that is not less than the advisory sentence for the underlying offense,” which would be ten
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years, “or more than three times the advisory sentence for the underlying offense,” which would be thirty years. “However, the additional sentence may not exceed thirty years.” The history is just so compelling that I just cannot decrease it by any amount, nor take down the importance. He has got to stop, and to do that, I’m going to sentence him to thirty years in the Indiana Department of Correction on the second count, cases to run concurrently, imprisonment to run concurrently.

Ms. Calhoun: Concurrent?

The Court: Concurrent.

Ms. Calhoun: So just thirty years?

The Court: Thirty years.

\* \* \* \* \*

Mr. Hunter: So, what you’re telling us, though, to be clear for the record, is that you’re sentencing him on both counts to a total of thirty years? Isn’t that correct?

The Court: I’m sentencing him to twenty on the armed robbery.

Mr. Hunter: Right.

The Court: I’m sentencing him too [sic] thirty years on the Habitual Offender, which is what’s provided here by the statute.

Mr. Hunter: Right.

The Court: And I’m letting them run concurrently, so that his time on charge [sic] is counted

as time on the second one. Anything further?

Tr. pp. 483-84, 486-87.

Although the trial court correctly recited the applicable statute<sup>1</sup>, it ultimately made a mistake by ordering separate sentences to be served concurrently. “A habitual offender finding does not constitute a separate crime nor does it result in a separate sentence.” Howard v. State, 873 N.E.2d 685, 689 (Ind. Ct. App. 2007). The sentencing order does not correct or clarify this error. It lists the thirty-year sentence for being an habitual offender as a separate sentence under count 2, but notes that it is an “enhancement” of count 1 and the sentences are to run concurrently. App. p. 155.

The State contends that we must instruct the trial court on remand to classify the thirty years as an enhancement to the twenty-year armed robbery sentence. That instruction on remand would give Carter a fifty-year sentence. We think that this position would be contrary to the intention of the trial court. Based on the transcript, it seems the trial court intended Carter to serve thirty years. Carter argues in his reply brief that any error by the trial court does not justify adding twenty years to the thirty-year

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<sup>1</sup> The habitual offender sentencing statute provides in part:

The court shall sentence a person found to be a habitual offender to an additional fixed term that is not less than the advisory sentence for the underlying offense nor more than three (3) times the advisory sentence for the underlying offense. However, the additional sentence may not exceed thirty (30) years.

Ind. Code § 35-50-2-8(h).



sentence that the court intended and imposed. We agree. On remand, the trial court must clarify the sentence.

### **Conclusion**

The trial court did not abuse its discretion in denying Carter's motion for a mistrial. The trial court's remark to the prosecutor did not amount to fundamental error. We affirm Carter's conviction for Class B armed robbery and his status as an habitual offender. The trial court erred by treating the habitual offender enhancement as a separate count and ordering it to be served concurrently to the twenty-year sentence for robbery. We remand for the trial court to remedy the error and clarify the sentence.

Affirmed in part and remanded in part.

SHARPNACK, J., and VAIDIK, J., concur.